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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re SCOTT EDGAR DYLESKI on Habeas Corpus.	A152130 (Contra Costa County Super. Ct. Nos. 05-161510-3, 5-060254-0)

Defendant was convicted of special circumstance first degree murder committed when he was nearly 17 years old. He was sentenced to life without the possibility of parole (LWOP). Defendant was granted a resentencing hearing pursuant to *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*), and he was once again sentenced to LWOP. Defendant contends the trial court abused its discretion in reaffirming the LWOP sentence. After his notice of appeal was filed, however, the Governor signed into law Senate Bill No. 394 (2016–2017 Reg. Sess.) amending Penal Code[1] section 3051 to provide all youth offenders serving LWOP sentences in California a parole suitability hearing after 25 years of incarceration. Because defendant will receive a parole suitability hearing after 25 years of incarceration, we find defendant's challenge to his LWOP sentence is moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant was convicted of the brutal murder of Pamela Vitale in her home. The victim suffered significant injuries including multiple blows to the head caused by blunt

[1] All statutory references are to the Penal Code unless otherwise indicated.

force trauma, a deep abdominal stab wound, and incisions in her back forming an H-shape.

In April 2009, this court affirmed defendant's conviction for special circumstance first degree murder, residential burglary, and his sentence of LWOP. (*People v. Dyleski* (Apr. 9, 2009, A115725) [nonpub. opn.].) The Supreme Court denied review.

We find it unnecessary to describe the numerous petitions defendant filed in the federal and state courts challenging his conviction and sentence. Suffice it to say, these petitions were denied.

Following recent decisions of the United States and California Supreme Courts, however, defendant filed another petition for writ of habeas corpus in the superior court asserting his LWOP sentence was unconstitutional under the Eighth Amendment. He sought resentencing under *Miller, supra*, 567 U.S. 460, and its progeny including *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*).[2] The superior court issued an order to show cause. The People conceded defendant was entitled to a new sentencing hearing for the court to consider the factors enumerated in *Miller* before determining whether to impose LWOP on defendant.

A. *Resentencing Hearing*

1. Defense

On June 30, 2017, after the trial court had reviewed all the briefs, transcripts, and case law, it conducted a resentencing hearing in which witnesses, including defendant, testified.

During defendant's testimony, he expressed sympathy for Pamela Vitale's family, but maintained he did not kill her. He admitted as a child and teenager he was not perfect, and his morbid art referred to at his trial was an expression of a dark secret that he hated himself. In explaining a lyric he had written entitled "Live for the Kill," defendant stated he was actually referring to the day he would have the courage to kill himself. Defendant also explained he had obtained counseling, built many strong

[2] We will discuss *Miller* and *Gutierrez* more fully later in this opinion.

relationships with friends and family, and had a fiancée who was his constant companion. He believed he had great potential to help others. He apologized for his "thoughtless and selfish" actions in drinking alcohol, smoking marijuana, stealing credit cards, and lying to his family and friends. He was thankful he had been sent to prison and provided with the chance to change his life. Defendant was proud of the person he had become and looked forward to taking on more responsibilities. And regardless of the court's decision, he would continue living the same life of service and would help other inmates to "get an education, go to self-help groups, counsel at-risk youths, practice my Wiccan faith,[3] and get my own education."

Defendant's father, Ken Dyleski, testified that after he and defendant's mother separated, he had difficulty remaining close to defendant because of various problems, but he "stuck with Scott," paid child support, and tried to visit him as much as possible. He described defendant as "a little quiet," and because he was very small for his age, he was "picked on quite a bit." That said, defendant was intelligent, "remarkably centered" and exhibited good sense. According to Mr. Dyleski, defendant required little discipline, and got along very well with his stepsister and others.

On one occasion Mr. Dyleski and defendant's mother spoke with a psychologist about defendant "to get some ideas" and to ask "some pertinent questions." But according to Mr. Dyleski, the psychologist assured them there was no reason to be concerned, and "[t]hese things are normal things that children do when they grow up." So long as his grades were fine, and he was dealing well with others, the psychologist believed there was no reason for alarm.

Since Pamela Vitale's death, Mr. Dyleski "saw no joy" or anything in defendant's demeanor suggesting he was involved in the murder. Mr. Dyleski believed it would be

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[3] According to Merriam-Webster's dictionary, Wicca is "a religion influenced by pre-Christian beliefs and practices of western Europe that affirms the existence of supernatural power (as magic) and of both male and female deities who inhere in nature, and that emphasizes ritual observance of seasonal and life cycles." (Merriam-Webster's Collegiate Dict. (10th ed. 2000) p. 1347.)

"in the interest of justice" for his son to be resentenced to 25 years to life. As Mr. Dyleski completed his testimony, he asked to have defendant evaluated by an independent psychiatrist to determine if he is a danger to society.

Defendant's fiancée, Kati S., who lived in Germany, first met him in 2011 and had been in constant contact with him for seven years, trying to visit at least once a year. During their relationship, they had exchanged "thousands of pages" of letters, and she spoke to him often on the phone. She observed defendant "constantly worked on himself," was involved in prison programs, and helped other prisoners with education and to "become better people." Kati believed defendant was a "very honest person" who never lied to her, but did acknowledge "you never know that for a hundred percent."

Speaking on defendant's behalf, a close friend of defendant's mother, Mary Ann L., explained she had visited defendant in prison, and since his mother's death had talked to him on the telephone every week. As to defendant's behavior in prison, Mary Ann stated that if the court read defendant's prison files, they would demonstrate defendant had not been in trouble since he was incarcerated, volunteered to help at-risk youths, tutored and listened to other inmates, was a lay minister within his church, organized and administered church services for other inmates who were interested in his church, and intended to get a college degree so he could find a meaningful job upon his release from prison. She believed defendant was rehabilitated.

In explaining her interest in defendant, Mary Ann L. testified she had suffered from depression like him, and her 23-year-old son committed suicide in 2010 because he was depressed. Her son was trying to acquire his degree in mathematics, the same degree defendant was pursuing.

Mary Ann L. also indicated she was operating on the assumption defendant truthfully denied killing Pamela Vitale, and her opinion would be different if he killed Pamela. Mary Ann admitted she did not know defendant or his mother before he was arrested and became acquainted with them afterwards. Defendant's mother told Mary Ann she burned defendant's backpack because she believed it had "information in it

about the credit cards."[4] The witness was not aware that among the items destroyed was a book entitled, "Murder."

2. Prosecution

Tamara H. was Pamela Vitale's sister. She testified about the pain and sense of loss she continued to experience since her sister's murder. Tamara stated, "To lose her was to lose some of myself as well." After Pamela's death, she suffered from "physical pain, and emotional terror." It was still difficult for her to look at photographs of her sister. Most importantly, she could "no longer share the special moments or the everyday moments" of her life with Pamela.

Before losing both parents, Tamara observed their torment and "a clear decline in their physical and emotional health" after Pamela's death. She watched them "heroically try to continue with their lives, but the stress and anguish of constantly remembering and reliving Pamela's last moments of life took a heavy toll on them." And she "watched these two kind, honest, good people literally diminish before my eyes." Life for them, according to Tamara, "had become profoundly difficult." She lamented that Pamela never got to see her children get married or hold her two grandchildren. She "implore[d]" the court to uphold defendant's LWOP sentence.

Pamela's son, Mario V., was the next prosecution witness. When his sister told Mario there was going to be a resentencing hearing for defendant, he "felt like I'd been kicked in the stomach." The unexpected news caused all the old emotions to come "flooding back." His said "our lives have been defined" as "before" and "after" his mother's death. Before her death, there were family reunions for Christmas or Thanksgiving in various parts of the country and in the time following her death, these family gatherings had, by and large, ceased. He observed his grandparents were never the same again, "as if a light inside them went out," and "they died of broken hearts."

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[4] Defendant engaged in credit card fraud to purchase equipment to grow marijuana. Defendant placed orders using the victim's residence address. (*People v. Dyleski, supra*, A115725.)

Since his mother's death, both he and his sister had gotten married, but their weddings were "bittersweet" because "there was clearly a huge piece missing from our milestone days," and the grandchildren did not know about their "amazing grandma." He related his life had profoundly changed since his mother's death. The loss of his mother had taken a personal toll. He was more detached and had few close friends because he did not want to let people become too close to him. Previously, he was outgoing and sociable, but now bordered on being "reclusive with anxiety issues." Mario asked the court to uphold the original sentence.

Following the completion of Mario V.'s testimony, Marisa V., Pamela's daughter, spoke about her mother. Marisa began by reading from a document written by Pamela discussing her life, travels, and her hopes and dreams for the home she and her husband were building. Marisa testified words could not possibly express how the last 11 years had been for her since her mother was murdered. Receiving a call from her brother that somebody had killed their mother "was the single worst moment" of her entire life. In her eyes Pamela was "a super human." After her mother died, Marisa gave birth to twins. She testified her children would never know their grandmother, and she would never be able to ask her mother parenting questions or share a family vacation with her. Marisa had spent countless hours in therapy, and "drifted through life in darkness." She told the court of the difficulty of explaining to her three-year-old children the death of their grandmother, while "trying to teach them about love and kindness and how to treat people in this world." Though their lives could move forward, Marisa stated, "the deep pain and heartache is always in our hearts, chained to us forever."

The final prosecution witness was Pamela Vitale's husband, Daniel H. Speaking to the defendant directly, Daniel began by noting that at the local high school, at least two to four young people attempt suicide every year, and "they don't do what you did." Though Daniel declined to judge defendant solely by his worst acts, he told defendant, "What your dad did, opening his heart right here, that's real, and it's honest." He suggested defendant emulate his father. Daniel wished defendant "could get up here and ask Judge Zuñiga to give you a chance, but you just scratched the iceberg. . . . You've got

to really come clean and touch heart." He hoped "the people out there who care about you help you dig that deep, but you're not there yet."

3. Counsels' Arguments

Following the conclusion of the testimony, defense counsel argued defendant was innocent of the murder. Counsel asserted defendant had a "nearly spotless" prison record with no violent incidents and was a model prisoner. Counsel requested the court assess defendant's California Department of Corrections and Rehabilitation (CDCR) records, and the "abundance of evidence of rehabilitation . . . which independent of any issue of guilt or innocence" demonstrated defendant had no propensity for violence and was a law-abiding person who avoided "many potential pitfalls that occur in prison," and "managed to stay the mature and nonviolent individual that he has always been." In view of Daniel H.'s testimony, defense counsel also sought to introduce further evidence regarding whether defendant or someone else was culpable for the murder. The court responded it would not allow counsel to turn the hearing into "an attempt to show that it is [Daniel H.] who killed his wife."

The prosecutor addressed the court first observing defendant had never been psychologically evaluated by the CDCR. He then highlighted previous statements of Pamela's parents concerning the emotional effect of their daughter's murder. Addressing *Miller* and its progeny, the prosecution discussed in detail that the trial court's original sentencing presciently addressed most, if not all, of the factors discussed in *Miller*.

In advocating for LWOP, the prosecutor argued the individuals associated with the case were being revictimized because the hearing had opened some "very sensitive wounds to a very good family" who should "never have to go through this again." While the prosecutor agreed defense counsel's legal arguments asserting his innocence could not be held against defendant, he maintained the court could consider the lies in defendant's 2012 declarations under penalty of perjury and his sworn testimony at the hearing, both of which clearly demonstrated defendant's absence of remorse and regret.

The prosecutor also discussed defendant's drawings and writings arguing they are "clearly Pagan, clearly dark, one could say demonic." He believed they were the best evidence of defendant's mens rea at the time of the commission of the crime.

In concluding his remarks, the prosecutor described the circumstances of the crime as "so bad" and "so evil" that "in and of itself [it] should convince anybody that Scott Dyleski is irreparable."

4. Sentencing Decision

The trial court reviewed *Miller* and *Gutierrez* and the factors to be considered when sentencing a minor to LWOP, including the *Gutierrez* reference to considerations under section 190.5[5] and the California Rules of Court. After incorporating its comments and findings made at defendant's initial sentencing, the court reaffirmed defendant's LWOP sentence.

On July 13, 2017, the court resentenced defendant to life without possibility of parole.

II. DISCUSSION

Defendant challenges the court's reaffirmance of the LWOP sentence, contending the trial court abused its discretion by focusing primarily on the nature of the offense rather than on "numerous factors relating to the defendant's youth."

A. *Defendant's Challenge to His LWOP Sentence Is Moot*

Less than two months after the notice of appeal was filed, but before defendant filed his opening brief, Governor Brown signed Senate Bill No. 394 (2016–2017 Reg. Sess.) (Senate Bill 394), which amends section 3051[6] to make a juvenile offender serving

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[5] Section 190.5, subdivision (b) provides that a defendant found guilty of first degree murder with special circumstances who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confined in state prison for life without the possibility of parole, or at the discretion of the court, 25 years to life.

[6] Section 3051 addresses, among other things, when a youth offender who is convicted of a controlling offense committed before he or she has attained the age of 18, shall be eligible for a parole hearing.

an LWOP sentence eligible for parole after 25 years. Because defendant is thus entitled to a parole hearing during his 25th year of incarceration, we conclude amended section 3051 renders defendant's challenge to his LWOP sentence moot.

1. Case and Legislative Law Leading to Passage of Senate Bill 394 and to Amendment of Section 3051

To understand what led to the passage of Senate Bill 394 and the amendment to section 3051, we discuss the relevant case and legislative history.

A series of cases have issued limiting the types of sentences which may be imposed on juvenile offenders. (See *Roper v. Simmons* (2005) 543 U.S. 551 [juveniles are not eligible for death penalty]; *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*) [juvenile convicted of a nonhomicide offense may not be sentenced to LWOP]; *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*) [extending *Graham* to juveniles who receive sentences which are the functional equivalent of LWOP.])

Significantly, in *Miller v. Alabama*, the United States Supreme Court held that a mandatory LWOP sentence for juvenile offenders violates the Eighth Amendment's prohibition against cruel and unusual punishment. (*Miller, supra,* 567 U.S. 460, 465.) Although the court did not foreclose an LWOP term for juveniles, it noted the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." (*Id.* at p. 479.) To that end, the court discussed a range of factors for a sentencing court to consider before imposing LWOP on a juvenile offender. Those youth-related factors include the defendant's chronological age and hallmark features of youth, the family and home environment, the circumstances of the offense, whether the defendant could have been charged and convicted of a lesser offense but for the incompetencies of youth, and the possibility rehabilitation. (*Id.* at pp. 477–478.) *Miller* was subsequently held to operate retroactively in *Montgomery v. Louisiana* (2016) 577 U.S. ___ [136 S.Ct. 718, 734, 193 L.Ed.2d 599] (*Montgomery*), because it announced a substantive rule of constitutional law.

In response to *Miller, Graham*, and *Caballero,* the California Legislature enacted Senate Bill No. 260 (2013–2014 Reg. Sess.) (Senate Bill 260) becoming effective on

January 1, 2014. Senate Bill 260 provided a juvenile who was under the age of 18 at the time of his or her crime with a "youth offender parole hearing" during the 15th, 20th, or 25th year of his or her incarceration, depending on his or her "controlling offense." (§ 3051, subds. (a) & (b).) At the youth offender parole hearing, the Board of Parole Hearings (Board) is directed to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).) Senate Bill 260, however, excluded juveniles sentenced to LWOP. (§ 3051, former subd. (h).)

During the same year Senate Bill 260 became effective, the California Supreme Court in *Gutierrez*, *supra*, 58 Cal.4th 1354, considered the constitutionality of section 190.5, subdivision (b), as applied to juvenile homicide offenders sentenced to LWOP before *Miller*. That statute authorizes a trial court to impose either an LWOP term or a term of 25 years to life for a juvenile offender found guilty of first degree murder with special circumstances, and who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime.[7] (§ 190.5, subd. (b).) The Supreme Court first determined that section 190.5, subdivision (b) survived constitutional scrutiny under *Miller*. (*Gutierrez*, at p. 1387.) It then held that *Miller* requires a sentencing court in exercising that discretion, to consider the *Miller* factors described above with a view to determining whether the juvenile convicted of special circumstance murder "can be deemed . . . to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults." (*Gutierrez*, at p. 1391.)

Our Supreme Court next examined the consequences of Senate Bill 260 in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). There, the defendant, 16 years old when he

[7] The special circumstance enumerated in section 190.5 which is relevant in the present matter is the fact the murder was committed during a burglary. (§ 190.2, subd. (a)(17)(G).)

shot and killed another teenager, received two mandatory consecutive 25-year-to-life terms. The defendant contended his 50-year-to-life sentence was the functional equivalent of LWOP and argued he was subject to the protections outlined in *Miller*. (*Franklin*, at pp. 268, 276.) The court concluded Senate Bill 260 entitled the defendant to a parole hearing during his 25th year in prison and rendered moot any infirmity in his sentence under *Miller*. (*Franklin*, at p. 276.) The court reasoned Senate Bill 260 "means that [the defendant] is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because [the defendant] is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here." (*Franklin*, at pp. 279–280.) It specifically noted the Legislature did not intend to require any additional resentencing procedures. (*Id.* at p. 279.)

2. The Effect of Senate Bill 394

As noted above, during the pendency of defendant's appeal, the Governor signed Senate Bill 394. This bill expands the youth offender parole hearing process under Senate Bill 260 to those persons sentenced to LWOP. (Stats. 2017, ch. 684, § 1.5.) To that end, Senate Bill 394 amends section 3051 to add subdivision (b)(4), which provides: "A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the [Board] during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions."

The effect of Senate Bill 394 on an appellant's LWOP sentence was examined in *People v. Lozano* (2017) 16 Cal.App.5th 1286, review granted February 21, 2018, S246013 (*Lozano*). There, the defendant was sentenced to LWOP in 1996 after she was convicted of first degree special circumstance murder committed when she was 16 years old. Fifteen years after the appellate court affirmed the judgment leaving intact the LWOP sentence, the United States Supreme Court issued its opinion in *Miller*. (*Lozano*,

at p. 1288.) As a result, the defendant was given a new sentencing hearing to consider the holding in *Miller*. Once again, the trial court sentenced her to LWOP. (*Lozano*, at p. 1289.) Because of the trial court's refusal to consider the defendant's conduct in prison during the intervening years, the appellate court reversed the LWOP sentence and remanded, instructing the trial court to conduct a new sentencing hearing to consider the defendant's postconviction conduct in prison in determining whether her crime reflected irreparable corruption as required by *Miller*. After the trial court held the defendant's third sentencing hearing, and considered the briefing, exhibits, victim impact statements, expert testimony, and evidence of a recent prison rules violation, the trial court again sentenced the defendant to LWOP. (*Lozano*, at p. 1289.)

As here, on appeal, the defendant in *Lozano* contended her LWOP sentence violated the Eighth Amendment. After briefing was completed, the appellate court asked the parties to address whether newly enacted section 3051, subdivision (b)(4) would render the defendant's Eighth Amendment claim moot. The court, in accord with the holding in *Franklin* and the reasoning in *Montgomery*, concluded the appeal was moot because the defendant was no longer subject to an LWOP sentence. (*Lozano*, *supra*, 16 Cal.App.5th at p. 1289, rev. granted.) The court reasoned, "*Montgomery* . . . permits the states to remedy a *Miller* violation by providing meaningful parole consideration—as afforded by Senate Bill 394—rather than resentencing." (*Id.* at p. 1291.) The court continued, "What Lozano is entitled to under the Eighth Amendment is a prison term that reflects ' "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" ' [citation], while recognizing that 'prisoners who have shown an inability to reform will continue to serve life sentences.' [Citation.] The Legislature has made the determination in Senate Bill 394 that neither Lozano, nor any other similarly situated California juvenile homicide offender, will face a sentence that possibly runs afoul of the Eighth Amendment as interpreted in *Miller*. The Constitution does not require that Lozano be resentenced or receive any additional reduction to punishment." (*Id.* at pp. 1291–1292.) The appeal was dismissed as moot.

3. Under *Lozano*, Defendant's Appeal Is Moot[8]

We find the analysis in *Lozano* persuasive,[9] and like the defendants in *Franklin* and *Lozano*, Senate Bill 394, amending section 3051, has rendered defendant's claim here moot. (*Jordan v. County of Los Angeles* (1968) 267 Cal.App.2d 794, 799 [repeal or modification of a statute may render moot issues in a pending appeal].) An issue is moot when an event occurs which renders it impossible for this court, if it should decide in favor of defendant, to grant him any effectual relief. (*People v. DeLeon* (2017) 3 Cal.5th 640, 645.)

The analysis in *Franklin* applies equally to the situation in this matter, as Senate Bill 394 extends Senate Bill 260 to juvenile offenders with LWOP sentences. Senate Bill 394 entitles defendant to a youth offender parole hearing, which means he is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. In other words, the parole provision in the newly amended section 3051 has "superseded" his earlier LWOP term. (*Franklin, supra*, 63 Cal.4th at p. 277; see *Lozano, supra*, 16 Cal.App.5th at p. 1289 [finding 8th Amendment issue moot because defendant "is no longer subject to an LWOP sentence"].) Defendant is thus no longer serving an LWOP sentence and no *Miller* claims arise.

Moreover, Senate Bill 394 comports with the United States Supreme Court's suggestion in *Montgomery* that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6-10-301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have

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[8] The Attorney General raised the issue of mootness in his brief. Defendant's appellate counsel did not file a reply brief addressing whether defendant's appeal is moot in view of section 3051.

[9] Review has been granted in the *Lozano* matter. However, under California Rule of Court, rule 81115(e)(1), pending review and filing of the Supreme Court's opinion, a published opinion of a Court of Appeal in the matter may be cited for potentially persuasive value only.

since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." (*Montgomery, supra*, 136 S.Ct. at p. 736.) In sum, we are unable to grant defendant the relief he seeks; Senate Bill 394 did that when it became effective on January 1, 2018. The issue is moot.

Finally, in *Franklin*, because it was not clear the defendant had been given the opportunity to present evidence at his original sentencing hearing that sections 3051 and 4081[10] deem relevant, the Supreme Court remanded the matter to the Court of Appeal with instructions to remand to the trial court for the limited purpose of determining whether the defendant was "afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations." (*Franklin, supra*, 63 Cal.4th at pp. 284, 286–287.) Here, unlike the circumstances in *Franklin,* defendant had the opportunity to develop the record during the resentencing hearing to be used at a future youth offender parole hearing. As explained above, in preparation for the resentencing hearing the parties briefed the *Miller/Gutierrez* factors, and discussed them at the hearing. And as previously detailed, defendant testified and presented other evidence—witness testimony—relevant to himself as a youthful offender. Additionally, the prosecutor and defense counsel both vigorously argued the *Miller* factors. The court then organized its reasoning for denying resentencing according to those factors. Therefore, the requisites of *Franklin* have been satisfied, and no remand for that purpose is warranted.[11]

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[10] Under section 4801, when a prisoner committed his or her controlling offense when he or she was 25 years of age or younger, in reviewing a prisoner's suitability for parole, the Board "shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (*Id.*, subd. (c).)

[11] Defendant has raised several issues. Because we find the appeal is moot, however, we need not address whether the trial court applied the *Miller* factors, abused its discretion in resentencing defendant to LWOP, or acted within its discretion in finding defendant's crimes reflected irreparable corruption and were not the result of transient immaturity. Nor do we need to address the prosecutor's reference to defendant's Wiccan beliefs which parenthetically defendant raised during his testimony. And we also do not

III. DISPOSITION

The appeal from the postjudgment order denying resentencing under *Miller, supra,* 567 U.S. 460, is dismissed as moot.

need to consider whether the prosecutor or the trial court impermissibly used defendant's claim of innocence against him or that the sentence amounts to cruel and unusual punishment.

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Margulies, J.

We concur:

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Humes, P.J.

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Banke, J.

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